STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
W. WHITBECK, C.J., R. GRIFFIN, and D. OWENS, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

Supreme Court
No. 123760

TARAJEE SHAHEER MAYNOR,

Defendant-Appellee.
_____/

Court of Appeals No. 244435
Circuit Court No. 2002-185279-FC

BRIEF ON APPEAL-APPELLANT

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The People charged defendant with two counts of first-degree felony-murder, MCL 750.316(1)(b), with the underlying felonies being child abuse in the first degree, MCL 750.136b(2), after she left her three-year-old son and ten-month-old daughter locked inside her black Dodge Neon for approximately four hours on a hot summer day while she was having her hair done at a beauty salon. Appendices 7a-9a. The children died from hyperthermia. Appendix 9a.

Following defendant's preliminary examination, 46th District Court Judge Stephen C. Cooper reduced the charges to involuntary manslaughter, MCL 750.321, ruling, in part, that child abuse in the first degree was a specific intent crime and that the People had failed to present any evidence to establish that defendant had the specific intent to harm or kill her children. Appendices 86a-90a.

On August 14, 2002, the People filed a motion to reinstate the first-degree felony-murder charges with Oakland County Circuit Court Judge Wendy L. Potts. Appendix 143a. On September 13, 2002, defendant filed an answer in opposition. Appendix 143a. On September 16, 2002, the People filed their reply brief. Appendix 144a. Following oral argument on September 25, 2002, Judge Potts reinstated the first-degree murder charges, holding that child abuse in the first degree was a general intent crime. Appendices 128a-137a. An order reinstating the original charges was filed on October 2, 2002. Appendix 141a.

On October 22, 2002, defendant filed an application for leave to appeal with the Court of Appeals, arguing that child abuse in the first degree was a specific intent crime and that the district court had not abused its discretion in reducing the charges. Appendix 163a. The People

filed their answer in opposition on October 30, 2002. Appendix 164a. On October 31, 2002, the Court of Appeals granted defendant's application. Appendix 146a.

Defendant filed her brief in the Court of Appeals on November 26, 2002. Appendix 165a. The People filed their appellee's brief on December 16, 2002. Appendix 165a. The Court of Appeals heard oral argument on February 12, 2003. Appendix 165a.

On April 8, 2003, the Court of Appeals' majority ruled that first-degree child abuse was a specific intent crime and that the People had established probable cause to believe that defendant was guilty of child abuse in the first degree along with second-degree murder, making the first-degree felony-murder charges proper. *People v Maynor*, 256 Mich App 238, 241-243; 662 NW2d 468 (2003). Appendices 147a-151a. In his concurring opinion, Court of Appeals' Chief Judge William Whitbeck concluded that child abuse in the first degree was a general intent crime, but agreed that two charges of first-degree felony-murder were established by probable cause. Id. at 246-264. Appendix 152a-162a.

On April 29, 2003, the People filed an application for leave to appeal with this Honorable Court, requesting that it address the issue of whether child abuse in the first degree was a specific or general intent crime. This Honorable Court then granted leave limited to the following issue:

> whether it is sufficient to instruct the jury using the statutory language regarding intent ("...knowingly or intentionally causes serious physical or serious mental harm to a child"), MCL 750.136b(2), or whether it also is necessary to instruct the jury regarding "specific intent."

People v Maynor, 468 Mich 943; _ NW2d _ (2003). Appendix 167a.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER READING THE STATUTORY LANGUAGE OF CHILD ABUSE IN THE FIRST DEGREE, MCL 750.136b(2), IS SUFFICIENT TO INFORM THE JURY OF THE REQUIRED MENS REA?

The People anticipate that defendant will contend that the answer to the first question posed by this Honorable Court should be, "no."

The People contend the answer is, "yes."

The district court ruled that child abuse in the first degree was a specific intent crime.

The circuit court ruled that child abuse in the first degree was a general intent crime.

The Court of Appeals' majority ruled that child abuse in the first degree was a specific intent crime, but concurring Chief Judge William Whitbeck concluded that child abuse in the first degree was a general intent crime.

II. WHETHER THE TRIAL COURT NEEDS TO INSTRUCT THE JURY ON SPECIFIC INTENT?

The People anticipate that defendant will contend that the answer to the second question posed by this Honorable Court should be, "yes."

The People contend the answer is, "no" because child abuse in the first degree is a general intent crime and, even if this Honorable Court disagrees, a specific intent instruction is unnecessary to the extent that it reiterates the People's burden of proof on one element of a criminal offense.

The district court ruled that child abuse in the first degree was a specific intent crime.

The circuit court ruled that child abuse in the first degree was a general intent crime.

The Court of Appeals' majority ruled that child abuse in the first degree was a specific intent crime, but concurring Chief Judge William Whitbeck concluded that child abuse in the first degree was a general intent crime.

STATEMENT OF FACTS

At the preliminary examination before 46th District Court Judge Stephen Cooper, the parties stipulated that Doctor Alexandrov, the medical examiner, would testify that three-year-old Adonnis Maynor and ten-month old Acacia Maynor, defendant's children, died from hyperthermia or heat exposure on June 28, 2002, after being left in a Dodge Neon. Appendices 9a and 77a.

Thereafter, Karl Reed testified that he was a co-owner of a full-service salon in the North Park Towers at 16500 North Park Drive in Southfield. Appendix 10a. The salon provided services for children as well as women and men and, therefore, children were in the salon every day. Appendix 12a. Of course, the children's parents remained responsible for their care while they were in the salon. Appendices 19a-21a. Defendant never brought her children to the salon, even though she was free to do so. Appendices 15a-21a.

Defendant had scheduled an appointment at approximately 4 p.m. for a touch up (relaxer), wash, blow dry and curl. Appendices 13a and 21a. Defendant had been a salon customer for two years and, since April, 2002, she had had her hair done every seven to ten days. Appendix 13a. Defendant's appointments generally lasted two or more hours. Appendix 14a. Reed was running behind and saw defendant sometime before 4:30 p.m. Appendix 14a. Defendant did not have any children with her. Appendix 15a.

Defendant did not talk to Reed about her children. Appendices 15a and 19a. While Reed knew that defendant had a boy named Adonnis, she did not tell him about a daughter named Acacia. Appendix 19a. Defendant did not tell Reed that her children were in her car in the parking lot. Appendix 15a.

Defendant received a relaxer for her hair. Appendix 16a. That day, many clients requested a relaxer because it had been hot, causing them to sweat, resulting in their need for a relaxer. Appendix 16a.

During her appointment, Reed noticed that defendant was studying a book. Appendix 17a. Defendant also tried on a sundress and had a sit-up massage. Appendices 17a-18a.

Defendant left the salon at 8 p.m. Appendix 18a.

During the entire time defendant was in the salon, she did not talk about her children or ask to go outside. Appendix 19a.

Tracy Key testified that she worked at the salon as an assistant. Appendices 24a-25a. Key shampooed and conditioned defendant's hair after it had been relaxed. Appendix 26a. Defendant spoke to Key about Key's son's death. Appendix 26a. Defendant did not mention that her children were in the car outside or talk about them. Appendix 28a.

Defendant tried on a sundress and had a massage. Appendix 29a.

At some point, defendant left the salon and went into a store in the building. Appendix 29a. Defendant returned with a juice or pop and a bag of chips. Appendix 29a.

Key confirmed that children were in the salon every day, including June 28, 2002. Appendix 30a.

Key believed that defendant left the salon after four hours. Appendix 30a.

Valerie Gasiewski testified that she was the emergency room entrance attendant at Providence Hospital in Southfield. Appendix 28a. At approximately 11 p.m., defendant pulled up to the emergency room entrance, looking in the window like she was searching for a patient. Appendix 33a. When Gasiewski went outside, defendant rolled down the passenger side

window. Appendix 34a. Defendant then jumped out of the car and started screaming. Appendix 34a. Defendant threw her arms in the air. Appendix 34a.

When Gasiewski asked if defendant needed help, she continued to scream. Appendix 34a. Defendant was not crying. Appendix 36a. Gasiewski then told defendant that she had to move her car because a helicopter was leaving the area. Appendix 34a. Defendant bent down and screamed that her babies weren't breathing. Appendix 34a. Gasiewski asked where the babies were and defendant said in the back seat. Appendix 34a.

Gasiewski looked in the car, saw that the children needed assistance and ran into the hospital to get the triage nurse. Appendix 34a. The baby girl was in the car seat and the young boy was on the back seat on the driver's side. Appendices 34a-35a. Neither child was belted. Appendix 35a.

The baby girl was not moving and was carried into the hospital in her car seat. Appendix 35a. The baby girl had vomit smeared on her face. Appendix 36a.

The boy was taken inside the hospital by Gasiewski's supervisor and had foam curling out of his mouth. Appendix 36a. The boy was stiff. Appendix 36a.

Gasiewski drove the car out of the area so that the helicopter could take off. Appendix 36a. The car reeked of vomit and Gasiewski had to roll down the driver's side window and stick her head out to be able to drive it. Appendix 36a.

The temperature in the car was like it was outside and Gasiewski was sure that it was not cold. Appendix 37a.

Southfield Police Office Keith Toupin arrived at the hospital at 10:50 p.m. Appendix 38a. Toupin was told about the car. Appendix 39a. When Toupin went to the four-door black Neon, he saw a face print, hand prints and lip prints from a child on the rear driver's side window.

Appendices 38a-39a and 41a. Some of the hand prints were on the outside at the very top of the window. Appendices 39a and 41a.

The child safety locks were engaged on the rear car doors, meaning that they had to be opened from the outside. Appendix 40a.

Southfield Police Detective Christopher Helgert testified that he was called at 11 p.m. and arrived at the police station around midnight. Appendix 43a. Helgert contacted one of the owners of the Empire Szechuan restaurant because defendant had claimed that she was abducted from a parking lot near the restaurant while there to obtain an employment application. Appendix 44a.

Based on the information he received, Helgert later spoke with defendant. Appendix 45a. Defendant told Helgert that she was attending U of M – Dearborn. Appendix 46a. When asked about what had occurred on June 28, 2002, defendant provided a detailed story about going to a Chinese restaurant to obtain an employment application. Appendix 48a. Defendant had her children with her. Appendix 48a. When defendant got out of her car, she was approached by an Italian-looking male, who asked her to go out. Appendix 48a. Defendant responded negatively. Appendix 48a. The man then showed her a gun and took her away. Appendix 49a. Defendant told Helgert that the Italian-looking man later raped her. Appendix 49a. The man then left her locked in a room and she could not escape. Appendix 49a. Thereafter, however, the man returned her to Applegate Shopping Center, where her car was parked. Appendix 50a. At that time, defendant found her children not breathing or dead and took them to the hospital. Appendix 50a.

Somewhere into defendant's tale, at approximately 5:30 a.m., six hours after defendant had taken her dead children to the hospital, Helgert advised defendant of her rights and she waived them. Appendices 1a and 48a. Helgert did not believe defendant and told her that

surveillance cameras in the Applegate Shopping Center would not support her claim about being kidnapped. Appendix 50a. Defendant then began to cry. Appendices 50a-51a.

Eventually, defendant wrote down that she was at the beauty salon. Appendix 51a. Thereafter, defendant told Helgert that, at 10:45 a.m., she had made her salon appointment. Appendix 52a. Defendant took her children with her to the appointment in her Neon. Appendix 52a. Adonnis had been strapped into the back seat and Acacia was in her child seat. Appendix 52a. Defendant left the children in the car, locking it. Appendix 57a.

Defendant parked in a location north of the salon. Appendix 53a. That parking spot was an illogical place for someone entering the salon to park and would have required defendant to walk 180 degrees around the complex. Appendices 53a-54a. Defendant's car was parked in an open asphalt parking lot. Appendix 55a. Defendant stated that the front driver's side window was lowered about one or one and one-half inches. Appendices 55a and 67a-69a.

Defendant told Helgert that she arrived at the salon at 4:20 p.m. and left at 7:50 p.m. Appendix 56a. Defendant told Helgert that the salon was busy. Appendix 56a. Defendant had her hair washed, cut and styled. Appendix 56a. Defendant did not tell Helgert that she had a massage or that she had tried on a sundress. Appendices 56a-57a. Defendant also did not tell Helgert that she bought a drink and chips for herself. Appendix 57a.

When defendant returned to her car, she claimed that she found Acacia on the floorboard of the back seat and Adonnis on the back seat. Appendices 57a-58a. There was vomit around the children and the car smelled horrible. Appendices 57a-58a. Defendant believed that Adonnis must have released baby Acacia from her car seat because he did not like to hear her cry. Appendix 58a.

Defendant claimed that after making her grisly discovery she drove around. Appendices 57a-59a. At first, she claimed that she had thought about killing herself, but then invented the abduction and rape story. Appendix 59a. Defendant's statement was admitted as part of People's Exhibit One. Appendices 2a-4a and 59a. When asked why she would make up the story about being abducted, defendant responded: "So that I wouldn't appear to be a horrible person, someone who left their children in a hot car." Appendices 4a and 63a. When asked if she had anything else to write down, defendant added: "I had never left them in the car before and I didn't know (was too stupid to know) that they would die. I didn't want them to die." Appendices 4a, 63a and 71a-72a.

Detective Helgert testified that the temperature on Friday, June 28, 2002, was in the 80's. Appendices 64a-65a. It was hot and, in fact, sweltering. Appendix 60a. Helgert believed that it would be hot inside of any automobile parked around the North Park Towers. Appendix 67a.

The People rested. Appendix 73a.

Defendant presented no witnesses. Appendix 73a.

The assistant prosecutor moved to bind defendant over on felony-murder, arguing that both second-degree murder and child abuse in the first degree were general intent crimes. Appendices 74a-81a and 85a-86a. Defense counsel responded that second-degree murder required that defendant knowingly created a very high risk of death or great bodily harm, knowing that death or great bodily harm was the likely result. Appendices, 84a-85a. Defense counsel argued that defendant was "[g]rossly negligent, grossly stupid, grossly ignorant", making involuntary manslaughter an appropriate charge. Appendix 82a.

The assistant prosecutor responded that defendant did not need to intend the result and that malice could be inferred when defendant performed an act with a high probability that it would result in death. Appendix 86a.

After hearing argument, Judge Cooper reduced the charges. Appendices 86a-90a. Judge Cooper ruled child abuse in the first degree was a specific intent crime and that defendant had to knowingly or intentionally cause serious physical harm or serious emotional harm to a child. Appendix 87a. Judge Cooper stated that he was following the Court of Appeals' ruling in *People v Gould,* 225 Mich App 79; 570 NW2d 140 (1997), lv den and vacated in part 459 Mich 955 (1999). Appendix 87a. Judge Cooper concluded that defendant did not know or intend the deaths of her children, relying on her self-serving statement that she "was too stupid to know they would die." Appendices 4a and 88a. Judge Cooper found that there was no evidence on the record that would support a finding that defendant knew that the result of her action would be the deaths of the children. Appendix 88a. For that reason, Judge Cooper found that there was no evidence of child abuse in the first degree to support the felony-murder charge. Appendix 88a.

Judge Cooper then determined that involuntary manslaughter was the appropriate charge, stating:

> To the ordinary mind, to all the rest of us, the result of the actions of this defendant were likely to prove disastrous to another, but in her mind that was not the case. Her conclusion was, quote, I was too stupid to know they would die, unquote.

Appendix 89a. Because defendant herself did not need to know of the danger to be guilty of involuntary manslaughter, Judge Cooper found that the People had established that offense. Appendix 90a.

The assistant prosecutor noted that *Gould* was not binding because this Honorable Court had vacated that part of the Court of Appeals' opinion, but Judge Cooper stated that the hearing was concluded. Appendix 90a.

On August 14, 2002, the People filed a motion to reinstate the first-degree felony-murder charges with Oakland County Circuit Court Judge Wendy L. Potts pursuant to *People v Goecke,* 457 Mich 442, 455-462; 579 NW2d 868 (1998), along with a supporting brief. Appendix 143a. On September 13, 2002, defendant filed an answer in opposition. Appendix 143a. On September 16, 2002, the People filed their reply brief. Appendix 144a.

Following oral argument on September 25, 2002, Judge Potts reinstated the first-degree murder charges, holding that child abuse in the first degree was a general intent crime. Appendices 128a-137a. An order reinstating the original charges was filed on October 2, 2002. Appendix 141a.

On October 22, 2002, defendant filed an emergency application for leave to appeal and motion for immediate consideration with the Court of Appeals, arguing that child abuse in the first degree was a specific intent crime and that the district court had not abused its discretion in reducing the charges. Appendix 163a. The People filed their answer in opposition on October 30, 2002. Appendix 164a. The following day, the Court of Appeals granted defendant's application. Appendix 146a.

Defendant filed her brief in the Court of Appeals on November 26, 2002. Appendix 165a. The People filed their appellee's brief on December 16, 2002. Appendix 165a. The Court of Appeals heard oral argument on February 12, 2003. Appendix 165a.

On April 8, 2003, the Court of Appeals' majority ruled that first-degree child abuse was a specific intent crime and that the People had established probable cause to believe that defendant

was guilty of child abuse in the first degree along with second-degree murder, making the first-degree felony-murder charges proper. *Maynor, supra.* Appendices 147a-151a. In his concurring opinion, Court of Appeals' Chief Judge William Whitbeck concluded that first-degree child abuse was a general intent crime, but agreed that two charges of first-degree felony-murder were established by probable cause. *Id.* Appendices 152a-162a.

On April 29, 2003, the People filed an application for leave to appeal with this Honorable Court, requesting that it address the issue of whether child abuse in the first degree was a specific or general intent crime. This Honorable Court then granted leave limited to the following issues:

> whether it is sufficient to instruct the jury using the statutory language regarding intent ("...knowingly or intentionally causes serious physical or serious mental harm to a child"), MCL 750.136b(2), or whether it also is necessary to instruct the jury regarding "specific intent."

Maynor, supra. Appendix 167a.

This is the People's brief on appeal.

ARGUMENT

I. READING THE STATUTORY LANGUAGE OF CHILD ABUSE IN THE FIRST DEGREE, MCL 750.136b(2), IS SUFFICIENT TO INFORM THE JURY OF THE REQUIRED MENS REA.

Issue Preservation:

The magistrate ruled that child abuse in the first degree, MCL 750.136b(2), was a specific intent crime. Appendices 86a-88a. On the People's motion to reinstate the original charges, Oakland County Circuit Court Judge Wendy L. Potts ruled that child abuse in the first degree, MCL 750.136b(2), was a general intent crime. Appendices 129a-133a. On defendant's appeal, a majority of the Court of Appeals held that child abuse in the first degree, MCL 750.136b(2), was a specific intent crime, even though Chief Judge William Whitbeck stated his belief that child abuse in the first degree was a general intent crime in a concurring opinion. Appendices 147a-162a. When the People filed an application for leave to appeal asking this Honorable Court to hold that child abuse in the first degree was a general intent crime, this Honorable Court granted leave directing the parties to address the following questions:

> whether it is sufficient to instruct the jury using the statutory language regarding intent ("...knowingly or intentionally causes serious physical or serious mental harm to a child"), MCL 750.136b(2), or whether it also is necessary to instruct the jury regarding "specific intent."

Maynor, supra. Appendix 167a.

The People will now address the first question raised by this Honorable Court.

Standard of Review:

Because this case involves questions of statutory construction and law, the standard of review is de novo. *People v Stone*, 463 Mich 558; 621 NW2d 702 (2001); *People v Thomas,* 438 Mich 448, 460; 475 NW2d 258 (1991).

Discussion:

A. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES THAT A DEFENDANT KNOWINGLY OR INTENTIONALLY CAUSES SERIOUS PHYSICAL OR SERIOUS MENTAL HARM.

MCL 750.136b provides:

(1) As used in this section:
   (a) "Child means a person who is less than 18 years of age and is not emancipated by operation of law as provided in section 4 of 1968 PA 293, MCL 722.4
   (b) "Cruel" means brutal, inhuman, sadistic, or that which torments.
   (c) "Omission" means willful failure to provide the food, clothing, or shelter necessary for a child's welfare or the willful abandonment of a child.
   (d) "Person" means a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person.
   (e) "Physical harm" means any injury to a child's physical condition.
   (f) "Serious physical harm" means any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.
   (g) "Serious mental harm" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.
(2) A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child. Child abuse in the first degree is a felony punishable by imprisonment for not more than 15 years.
(3) A person is guilty of child abuse in the second degree if any of the following apply:

(a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm to a child.
(b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
(c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

(4) Child abuse in the second degree is a felony punishable by imprisonment for not more than 4 years.

(5) A person is guilty of child abuse in the third degree if the person knowingly or intentionally causes physical harm to a child. Child abuse in the third degree is a misdemeanor punishable by imprisonment for not more than 2 years.

(6) A person is guilty of child abuse in the fourth degree if the person's omission or reckless act causes physical harm to a child. Child abuse in the fourth degree is a misdemeanor punishable by imprisonment for not more than 1 year.

(7) This section does not * * * prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force.

The underlined portions of MCL 750.136b represent amendments made in 1999.

In addressing issues of statutory construction, this Honorable Court has stated:

> We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed--no further judicial construction is required or permitted, and the statute must be enforced as written. *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135; 545 NW2d 642 (1996). We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent.

People v Morey, 461 Mich 325, 330; 603 NW2d 250 (1999).

The word "causes" is a transitive verb meaning: "to be the cause of; [or] bring about." *Random House Webster's College Dictionary* (1997), p 209. "[K]nowingly" is an adverb, which is derived from the verb "know" and the adjective "knowing" which means "having knowledge or information . . . [or] conscious; intentional; deliberate." *Random House Webster's College Dictionary, supra,* pp 726-727. "[I]ntentionally" is also an adverb and it means "done with

intention or on purpose; intended." *Random House Webster's College Dictionary, supra,* p 679. "[K]nowingly or intentionally" are adverbs which modify the verb "causes."

While the Court of Appeals' majority followed *Gould, supra,* and held that the words "knowingly" or "intentionally" meant the same thing, they clearly do not because the Legislature separated them in the statute by using the disjunctive word "or". *People v Wilson,* 97 Mich App 579; 296 NW2d 110 (1980). Additionally, the Legislature only used the phrase "intentionally causes" in describing acts prohibited under the vulnerable adult abuse statute, MCL 750.145n(1) and (3), and used the phrase "knowingly causes" in MCL 168.931(3), a statute prohibiting the making or placing of a false or scurrilous statement of fact about a candidate for public office. Consequently, the People submit that it is abundantly clear that "knowingly or intentionally" do not mean the same thing as held by the Court of Appeals' majority.

Indeed, the Legislature has chosen two words which define the type of mens rea required when a person commits the actus reus of the offense which results in serious physical or mental harm. See generally Torcia, Wharton's Criminal Law (14th edition), § 27, p 165, discussing the various types of culpable mental states, including knowingly or intentionally. Certainly, the Legislature was familiar with the language contained in the assault statutes and could have written the child-abuse statute in a manner which required the defendant to have an intent or purpose to accomplish a particular result without regard to whether the ultimate injury occurred. See MCL 750.83-750.84 and MCL 750.86 through 750.89. Instead, the People submit that the Legislature recognized the special protection children required and, therefore, the Legislature chose to punish knowing or intentional conduct which resulted in serious physical or serious mental harm.

At this point, the People would note that the Court of Appeals' majority in this case determined that language added 11 years after the amended child abuse statute was enacted meant that the language used in the 1988 Public Act created a specific intent crime. Appendices 148a-149a. Again, the People disagree. The Legislature was trying to remedy situations where the defendant's knowing or intentional act did not result in serious physical or serious mental harm to a child, even though it could have. Appendices 168a-171a. In addition, the Legislature wanted to punish cruel acts perpetrated upon children which resulted in no provable serious physical or serious mental harm. Appendices 168a-171a. The added language makes clear that it is the defendant's act, not defendant's intention to cause a specific type of harm when the act is committed, which is punished by looking to the resultant harm. As such, these amendments increase the protection afforded children, rather than detracting from it. Contrary to the Court of Appeals' majority opinion, there was no need for the Legislature to change the language of MCL 750.136b(2) because the problems it was addressing were the cases where the defendant's knowing and intentional acts could not be proven to have caused serious physical or serious mental injury or where the defendant's knowing and intentional acts should have resulted in serious physical or serious mental injury, but did not. Appendices 168a-171a. Additionally, as pointed out by concurring Judge Whitbeck's opinion, this Honorable Court's order vacating the portion of *Gould, supra,* which held that child abuse in the first degree was a specific intent crime had been issued when the amendments were made. Appendix 161a.

1. THE PLAIN AND ORDINARY MEANING OF THE WORD "KNOWINGLY" REFLECTS THE LEGISLATURE'S INTENT TO PUNISH ACTS DONE WITH CONSCIOUS AWARENESS.

Our Legislature has not adopted definitions of culpable criminal mental states like those contained in the Model Penal Code (MPC) or included culpable mental states in the definitional

section of the penal code, MCL 750.5 et. seq. Moreover, even though our Legislature has defined some of the terms used in the child abuse statute, MCL 750.136b(1)(a)-(g), it did not define the words "knowingly" or "intentionally". Consequently, those words must be given their plain meaning. *Morey, supra,* 330.

As discussed above "knowingly" is an adverb, which is derived from the verb "know" as well the adjective "knowing", which means "having knowledge or information . . . [or] conscious; intentional; deliberate." *Random House Webster's College Dictionary, supra*, pp 726-727. In his concurring opinion in this case, Judge Whitbeck discusses the fact that the Court of Appeals has reached varying results regarding whether the word "knowingly" requires a specific or general intent. Appendices 155a-158a.

At this point, the People would note that this Honorable Court has agreed that the concepts of specific intent and general intent can be confusing. *People v Nowack,* 462 Mich 392, 406 n 4; 614 NW2d 78 (2000); *People v Langworthy,* 416 Mich App 630, 639-641; 331 NW2d 171 (1982). Nevertheless, this Honorable Court has expressed the distinction between the two types of offenses as follows:

> The distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act.

Nowack, supra, 405-406 (quoting *People v Beaudin,* 417 Mich 570, 573-574; 339 NW2d 461 [1983]). In *Langworthy, supra, 639,* this Honorable Court added:

> While specific intent can easily be defined as "a particular criminal intent beyond the act done"[9] (whereas general intent is the intent simply to do the physical act), the ease of stating the definition belies the difficulty of applying it in practice.

[9] *People v Depew,* 215 Mich 317, 320; 183 NW 750 (1921). See also, *Roberts v People,* 19 Mich 401, 414 (1870); LaFave & Scott, Criminal Law § 28, p 202.

> "[T]he most common usage of 'specific intent' is to designate **a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime**." (Emphasis supplied.)

The problem with applying the difference between the two types of offenses occurs because penal codes, as well as the judicial decisions interpreting them, use numerous terms to describe culpable mental states interchangeably and even inconsistently. See generally Torcia, Wharton's Criminal Law, supra, § 27, p 165. Obviously, this problem has occurred in Michigan as noted in Chief Judge Whitbeck's concurring opinion discussing the divergent views about the use of the words "knowingly" and "intentionally" and their resultant meaning. Appendices 155a-158a.

Nevertheless, as discussed above, the People submit that "knowingly" is an adverb describing the act done; it does not require an additional or special mental state be in the actor's mind. The Legislature could have easily required such a mental state, but it did not. See e. g., MCL 750.83, which prohibits assaulting another where the actor has the intent to cause great bodily harm regardless of whether such harm results. Under the child abuse in the first degree statute, if the actor's knowing or intentional act causes serious physical harm or serious mental harm to a child, criminal liability can be imposed. As such, the People submit that the Court of Appeals' majority was mistaken when it stated that an additional (special) mental state was required beyond one which related to the actus reus of the crime.

The People would add that the Court of Appeals has repeatedly held that the words "knowing" or "knowingly" denote a general intent crime. *People v Watts,* 133 Mich App 80; 348 NW2d 39 (1984), lv den 419 Mich 938 (1984)(receiving and concealing stolen property); *People v Gleisner,* 115 Mich App 196; 320 NW2d 340 (1982), lv den 417 Mich 1095 (1983)(resisting and obstructing). Indeed, the People believe that the instant statute is most analogous to the resisting and obstructing statute discussed in *Gleisner, supra.* That statute required a defendant to

"knowingly and willfully" obstruct or resist a police officer. The Court of Appeals held that that statutory language created only a general intent crime which required the defendant's knowledge that the person he was resisting or obstructing was a police officer. Similarly, the People submit that a defendant's knowledge that she is committing an act, where that act causes serious physical or mental harm to a child, is all that is required to impose criminal liability under MCL 750.136b(2).

The People would note that *Gleisner*, *supra,* also considered the fact that the purpose of the resisting and obstructing statute was to protect officers in making its determination that the word "knowingly" did not create a specific intent crime. The *Gleisner* panel determined that the statute's purpose of protecting police officers would be defeated if resisting and obstructing were held to be a specific intent crime because such a holding would allow voluntary intoxication to be used as a defense.

The People submit that a similar rationale applies here. In fact, in support of her decision that child abuse in the first degree was a general intent crime, Judge Potts specifically noted that the purpose of the child abuse statutes was to protect children and that purpose was furthered by holding first-degree child abuse to be a general intent crime. Appendix 133a. The People would add that this Honorable Court was persuaded by that same rationale when it ruled that the child torture statute created only a general intent crime. *People v Kelley*, 433 Mich 882; 446 NW2d 821 (1989), rev'g 176 Mich App 219; 439 NW2d 315 (1989).

Here, defendant was certainly aware of what she was doing and the resultant harm was caused by her knowingly and intentionally performed act. Obviously, the statute could not punish defendant if she had driven to the beauty salon believing that she was alone and was unaware that one or both of her children had hidden themselves inside her car. Under either

scenario, the result is the same, but it is the nature of defendant's act which constitutes the crime, not any additional mental element beyond the knowing mental element of the actus reus.

2. THE PLAIN AND ORDINARY MEANING OF THE WORD INTENTIONALLY REFLECTS THE LEGISLATURE'S INTENT TO PUNISH INTENTIONAL, NOT ACCIDENTAL, ACTS.

As discussed above, "intentionally" is an adverb and it means "done with intention or on purpose; intended." *Random House Webster's College Dictionary, supra,* p 679.

Again, as noted in Chief Judge William Whitbeck's concurring opinion, the meaning of the word "intentionally" has been far from clear under Michigan jurisprudence. Appendix 157a. However, for the reasons discussed regarding the use of the term "knowingly", the People submit that "intentionally" here, as in other statutes, is used to denote the opposite of accidentally. See generally *People v Henry,* 239 Mich App 140; 607 NW2d 767 (1999), lv den 463 Mich 863 (2000). Certainly, a parent who throws her child down the stairs (intentionally) is different from a parent who trips and drops her child (accidentally), even if the resultant harm is the same. The People submit that the Legislature properly imposed criminal liability on the former, but not the latter when it penned MCL 750.136b(2).

B. THE HISTORY BEHIND THE CHILD ABUSE IN THE FIRST DEGREE STATUTE DICTATES THAT THE LEGISLATURE INTENDED IT TO BE A GENERAL INTENT CRIME.

In his concurring opinion, Chief Judge William Whitbeck sets out the historical background of the child abuse statute, Appendices 158a-160a, and the People will not repeat that analysis here, trusting that this Honorable Court is familiar with the historical roots of the current statute given its review of *Gould, supra,* and, more recently, *People v Sherman-Huffman,* 466 Mich 39; 462 NW2d 339 (2002). However, the People must add that *Kelley, supra,* was not even submitted to the Court of Appeals until after the 1988 child abuse statute was signed into law.

Appendices 172a-173a. Until that point, child cruelty had been held to be a general intent crime, *People v Jackson*, 140 Mich App 283, 287; 364 NW2d 310 (1985), lv den 423 Mich 859 (1985), and had been held not to require "a wrongful mental attitude." *People v Alderete,* 132 Mich App 351, 356; 347 NW2d 229 (1984), citing this Honorable Court's opinion in *People v Loomis,* 161 Mich 651; 126 NW 985 (1910).

Turning to the child torture statute, it appears that the Court of Appeals struggled with defining the word "torture" because that word had not been defined in the statute. Beginning with *People v Biegajski,* 122 Mich App 215; 332 NW2d 413 (1982), lv den 417 Mich 1080 (1983), the Court of Appeals applied the dictionary definition of "torture" and concluded that "infliction of violent bodily pain upon a child to satisfy sadistic motives" was required.

Two years later, however, in response to a vagueness challenge to the child torture statute, the Court of Appeals held that "torture" required a showing that the defendant "intentionally inflicted extreme, intense, or severe pain or injury upon the victim." *People v Webb,* 128 Mich App 721, 727; 341 NW2d 191 (1983), lv den 418 Mich 966 (1984). The *Webb* panel disagreed with *Biegajski* that the defendant's motive (i. e., a purpose other than punishment) distinguished child torture from child cruelty. *Webb, supra,* 727 n 3. Instead, the *Webb* panel concluded that "the proper line of distinction between the offenses is not the defendant's motive, but, rather, the degree of severity of the injury inflicted." *Id.* The reasoning of the *Webb* panel was followed in *People v Shelton,* 138 Mich App 510, 514-515; 360 NW2d 234 (1984), and *People v Porterfield,* 166 Mich App 562, 564-565; 410 NW2d 853 (1987).

The People would add that in *People v Martinez,* 123 Mich App 145; 333 NW2d 199 (1983), lv den 417 Mich 1100.7 (1983), the Court of Appeals reviewed the sufficiency of the factual basis for the defendant's guilty plea to child cruelty in a case where the defendant

admitted to beating her daughter with a belt and pictures were admitted to depict the injuries which occurred. The Court of Appeals stated:

> * * * defendant was not able to describe the nature of the injuries inflicted. It is readily apparent that in child cruelty cases the nature and the severity of the injuries inflicted will often be outside the knowledge of the accused.

Id. at 149.

Thereafter, the child cruelty statute survived vagueness challenges in 1985 in *Jackson, supra,* and, again, in 1986, in *People v Hicks,* 149 Mich App 737; 386 NW2d 657 (1986), lv den 425 Mich 882 (1986).

It was apparently these last two challenges to the child cruelty statute which prompted the Legislature to act.[1] Indeed, the stated purpose of the revised child abuse statute was to "replace prior child cruelty and child torture statutes, which were criticized as being archaic and vague." Kelly Ramsey and Richard L. Cunningham, *The "Shame" of Michigan's Child Abuse Law: A Call for Legislative Action,* 71 Mich BJ 546 (1992)(Footnotes omitted).

The Legislature obviously being aware of this background failed to draft language to indicate that any type of a special mental element above and beyond the mental state required with respect to the *actus reus*. As discussed above, it did not use the language "***with the intent to***", rather it selected adverbs modifying the verb "causes" and continued to focus the penalty on the harm which resulted from the defendant's act.

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[1] Ironically, the People would note that the Colorado Supreme Court has held that the words "tortured" and "cruelly punished" do not to refer to the mens rea of the crime of child abuse, but instead "to the actus reus as measured by the consequences wrought on the child." *People v Taggart,* 621 P2d 1375, 1383 (Colo, 1981).

In fact, the proposed penalty for child abuse in the first degree was the same as the penalty for child torture, but it was ultimately increased to fifteen years' imprisonment. The penalty for child abuse in the second degree remained the same as the penalty for child cruelty and the penalties for child abuse in the third and fourth degrees were two- and one-year misdemeanors, respectively. Given that the purpose of this statute is to protect children, it is implausible that the Legislature drafted the statute so as to require a defendant to intend or know that a particular injury would occur when infants, toddlers and even older children can be more easily injured than adults by abusive acts.

C. HOW OTHER JURISDICTIONS HAVE INTERPRETED CHILD ABUSE STATUTES.

As discussed above, Michigan has not adopted the Model Penal Code definitions and this Honorable Court did not adopt those definitions, even though it had requested the parties in *Sherman-Huffman* to brief the issue of whether it should consider adopting those definitions when our Legislature fails to define words concerning states of mind. *People v Sherman-Huffman,* 463 Mich 978; 623 NW2d 603 (2001). While the People have discovered no statute identical to Michigan's statutory scheme, the People have found cases in other jurisdictions which have grappled with the issue of whether their particular child abuse statute created a specific intent crime and have resolved that issue in a manner favorable to the People's proposed outcome in this case.

For example, in *State v Campbell,* 316 NC 168; 340 SE2d 474 (1986), the North Carolina Supreme Court reversed the appellate court's decision that its child abuse statute required the prosecution to prove that the defendant intended to cause the child serious injury. At that time, North Carolina's child abuse statute provided:

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:
(1) Permanent disfigurement, or
(2) Bone fracture, or
(3) Substantial impairment of physical health, or
(4) Substantial impairment of the function of any organ, limb, or appendage of such child,
is guilty of a Class I felony.

The North Carolina Supreme Court held:

> * * * the element in question is sufficiently established if a defendant intentionally inflicts injury that proves to be serious on a child of less than sixteen years of age in his care. **He need not specifically intend the injury to be serious.** (Emphasis supplied.)

Id. at 172. That Court went on to distinguish intentionally inflicted injuries from those inflicted accidentally.

Likewise, in *Rowe v State,* 974 P2d 937 (Wyo, 1999), the defendant claimed that Wyoming's child abuse statute created a specific intent crime. At that time, Wyoming's child abuse statute provided:

(a) Except under circumstances constituting a violation of WS 6-2-502, a person is guilty of child abuse, a felony punishable by imprisonment for not more than five (5) years, if:
(i) The actor is an adult or is at least six (6) years older than the victim; and
(ii) The actor intentionally or recklessly inflicts upon a child under the age of sixteen (16) years:
(A) Physical injury as defined in WS 14-3-202(a)(ii)(B); or
(B) Mental injury as defined in WS 14-3-202(a)(ii)(A).

Id. at 938. Physical injury was defined as:

> Death or any harm to a child including but not limited to disfigurement, impairment of any bodily organ, skin bruising, bleeding, burns, fracture of any bone, subdural hematoma or substantial malnutrition.

Id. at 938. Applying the same method of distinguishing specific intent from general intent crimes as is used in Michigan, the Wyoming Supreme Court held that:

> The child abuse statute contains no requirement that the accused intend any further act or future consequence, but merely requires that an accused intentionally or recklessly inflict physical injury.

Id. at 939. The Court then further stated "intentionally" meant only an act done "deliberately, purposely, knowingly, voluntarily or consciously," but did not require an 'intent to do some further action or attain some additional consequence.'" *Id.* at 940 (quoting *Dorador v State,* 573 P2d 839, 843 [Wyo, 1978]).

Finally, in *State v Ducker,* 27 SW3d 889, 891 (Tenn, 2000), in a case eerily reminiscent of the factual situation in the instant case, the defendant left her two boys, who were twenty-three and twelve-months' old, respectively, locked in her car for nine hours and they died from hyperthermia. While the defendant was initially charged with two counts of first degree murder for the reckless killing of a child, she was ultimately convicted of aggravated child abuse. *Id.* At that time, aggravated child abuse was defined as follows:

> (a) A person is guilty of the offense of aggravated child abuse who commits the offense of child abuse as defined in § 39-15-401 and:
> (1) The act of abuse results in serious bodily injury to the child; or
> (2) A deadly weapon is used to accomplish the act of abuse.
> (b) A violation of this section is a Class B felony; provided, that, if the abused child is six (6) years of age or less, the penalty is a Class A felony.

Id. at 894. Child abuse was defined as follows:

> Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect the child's health and welfare is guilty of a Class A misdemeanor; provided, that if the abused child is six (6) years of age or less, the penalty is a Class D felony.

Id. The defendant argued that the above-quoted statutes defined "a result of conduct offense and, therefore, the statute require[d] that one must actually be aware that her conduct would result in serious bodily injury to the child victim." *Id.* at 896. The defendant had testified that she did not see any danger in leaving her sons in the car for more than nine hours. *Id.* at 892. The Tennessee Supreme Court held:

> The actus reus is modified by the clause "other than by accidental means." Accordingly, the statute requires that the act of treating a child in an abusive manner or neglecting the child must be knowing conduct. For instance, the defendant must have knowingly left or abandoned her children in the car for more than eight hours. If the defendant had been unaware that her children were present in the car when she left her car parked in front of the hotel, the neglect of her children would have been accidental or unknowing. Contrary to the defendant's assertions, application of the mens rea to the actus reus of this statute precludes this statute from being a strict liability statute.
>
> Once the knowing mens rea is established, the next inquiry under the plain language of the statute is simply whether the child sustained an injury or, in the case of child neglect, whether the child suffered an adverse effect to the child's health or welfare. The legislature has employed the phrases "so as to injure" and "so as to adversely affect" when defining the injury aspect of the child abuse statute. These phrases clearly indicate that if an injury results from knowing abuse or neglect, the actor has committed child abuse.
>
> As a practical matter, the defendant's argument could render the child abuse statute ineffectual. Defendants in child abuse cases could argue that, while they in fact knowingly punished or spanked the child, they did not know harm would occur. We, therefore, reject the defendant's argument and hold that the mens rea of "knowing" refers only to the conduct elements of treatment or neglect of a child under the child abuse statute and conclude that the child abuse offenses are not result-of-conduct offenses. (Citation omitted.)

Id. at 897.

The People believe that the rationales discussed in the cases from North Carolina, Tennessee and Wyoming provide support for their argument that child abuse in the first degree is a general intent crime.

D. ALTHOUGH INSTRUCTING THE JURY WITH THE STATUTORY LANGUAGE SHOULD BE SUFFICIENT, WILL IT BE?

Here, as found by Judge Potts, the evidence establishes that defendant knew that she was leaving and that she intended to leave her children in the car which was parked on an uncovered asphalt lot for the duration of her salon appointment, which exceeded three- and one-half hours. Appendix 134a. See also Appendices 2a-4a, questions 5, 9, 12-14 and 19. Defendant locked her children into her car and had the child-safety locks engaged so that they could not get out of the back doors of the car without someone opening it from the outside. The temperature was in the eighties and the parties stipulated that the children died from hyperthermia or heat exposure inside the Neon. Appendices 9a and 81a.

While the People contend that reading the statutory definition is sufficient because it is clear in its meaning, the People have no doubt that defense counsel will argue that the statute required defendant to personally "know of" and "intend" the harm which actually resulted from her actions. Appendices 84a-85a, 114a and 126a. Given the meaning that will undoubtedly be attributed to the statute by defense counsel, this assistant prosecutor is reminded of Lewis Carroll's famous dialogue in Alice's Adventures in Wonderland, chapter 6 (1865):

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
> "The question is," said Alice, "whether you can make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

Given that the parties' arguments will attribute different meanings to the statutory language, the People anticipate that the jury will be confused and inquire about which meaning is correct.

MCL 768.29 imposes upon the trial judge a duty to instruct the jury upon the applicable law. This Honorable Court has restated that requirement as:

> the trial court is required to instruct the jury concerning the law applicable to the case and **fully and fairly present the case to the jury in an understandable manner**. (Emphasis supplied.)

People v Mills, 450 Mich 61, 80; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). In *People v Vaughn,* 447 Mich 217, 227; 524 NW2d 217 (1994), reh den 447 Mich 1202 (1994), this Honorable Court emphasized that:

> * * * trial judges are responsible for insuring that cases are presented to juries in an intelligent manner so that the jurors have a clear and correct understanding of what it is they are to decide. This responsibility demands that the trial judge instruct a jury regarding the general features of a case, define the offense, and explain what must be proven to establish that offense. Where the instruction pertains to an essential element of the charged offense, the trial judge's duty to adequately instruct must be adhered to even absent a request from counsel. Failure to recognize these instructional responsibilities may demand reversal where an erroneous or misleading charge denies a criminal defendant the right to have a properly instructed jury consider the evidence. (Citations omitted.)

The People submit that the trial judge in this case must be able to explain to the jury what is required in order to convict defendant because they will be confused by a reading of the statutory language after hearing the arguments of both parties. As such, the People believe that this Honorable Court must address the issue of whether child abuse in the first degree is a general or specific intent crime so that the trial judge will be able to instruct the jury about what the law requires in order to support a conviction for child abuse in the first degree. Obviously, it is the People's position that child abuse in the first degree is a general intent crime.

II. BECAUSE CHILD ABUSE IN THE FIRST DEGREE IS A GENERAL INTENT CRIME, THE TRIAL COURT DOES NOT NEED TO READ THE SPECIFIC INTENT INSTRUCTION, CJI2d 3.9, AND, EVEN IF CHILD ABUSE IN THE FIRST DEGREE IS A SPECIFIC INTENT CRIME, CJI2d 3.9(1) AND (2) MERELY REITERATE THE PROSECUTION'S BURDEN OF PROOF ON AN ELEMENT OF THE OFFENSE AND, THEREFORE, ARE UNNECESSARY; ON THE OTHER HAND, CJI2d 3.9(3) CORRECTLY STATES THE LAW AND ASSISTS THE JURY IN DETERMINING A DEFENDANT'S INTENT AND, THEREFORE, IS A PROPER INSTRUCTION.

Issue Preservation:

This Honorable Court granted leave, asking the parties to address the following questions:

> whether it is sufficient to instruct the jury using the statutory language regarding intent ("...knowingly or intentionally causes serious physical or serious mental harm to a child"), MCL 750.136b(2), or whether it also is necessary to instruct the jury regarding "specific intent."

Maynor, supra. Appendix 167a.

Having addressed this Honorable Court's first question in Issue I, the People now answer this Honorable Court's second question.

Standard of Review:

The conceptual differences between specific and general intent crimes have been discussed in Issue I. See discussion on pages 15-16.

CJI2d 3.9, Michigan's specific intent instruction, provides:

> (1) The crime of _____ requires proof of a specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that [he/she] did the acts with the intent to cause a particular result.
> (2) For the crime of _____ this means that the prosecution must prove that the defendant intended to [*state the required specific intent*].
> (3) The defendant's intent may be proved by what [he/she] said, what [he/she] did, how [he/she] did it, or by any other facts and circumstances in evidence.
>
> *Use Note*

> This instruction should be given if intent is a disputed issue in the case, or if the jury expresses confusion regarding the intent required to convict. *See People v Beaudin,* 417 Mich 570, 339 NW2d 461 (1983). It should follow the instructions defining the crime or crimes, and should be followed by the instructions on any applicable defenses that negate specific intent.
> The second paragraph should be stated once for each crime involving a different specific intent. The required intent should be inserted in the brackets as indicated. If several different crimes all involve the same specific intent (for example, armed robbery and unarmed robbery both require an intent to permanently deprive), this paragraph should be stated only once, listing the crimes in the blank and inserting the common intent in the brackets.
> See also CJI2d 7.3a, Accident as Defense to Specific Intent Crime.

This Honorable Court does not officially sanction the use of the CJIs and trial judges who use them are encouraged to examine them carefully in order to ensure their accuracy. *Vaughn, supra*, 235 n 13; *People v Petrella,* 424 Mich 221, 277; 380 NW2d 11 (1985). As discussed above, MCL 768.29 imposes the duty to instruct the jury on the applicable law upon the trial court. This Honorable Court has reviewed instructional issues under the standard of review set forth in *People v Carines,* 460 Mich 750, 774; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999), depending on whether the error is one of constitutional magnitude and whether it has been preserved; however, this Honorable Court has recently held that the failure to instruct on any of the elements of an offense is structural error requiring automatic reversal. *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000).

Discussion:

As discussed above, it is the People's position that child abuse in the first degree is a general intent crime and, therefore, no specific intent instruction is required. *People v Perez-DeLeon,* 224 Mich App 43, 57; 568 NW2d 324 (1997), lv den 456 Mich 958 (1998).

In the event that this Honorable Court disagrees and concludes that child abuse in the first degree is a specific intent crime, the People submit that the specific intent instruction in its first

two paragraphs merely reiterates an element of an offense and, therefore, is unnecessary and should not be given; however, the People believe that the language in CJI2d 3.9(3), which instructs jurors on how they may determine a defendant's intent is a correct statement of the law and should be retained for those cases where intent is disputed.

In support of this argument, the People note that Sixth, Seventh, Eighth and Ninth federal circuit courts have eliminated their specific intent instructions. Sixth Circuit Pattern Criminal Jury Instructions 2.07; Seventh Circuit Pattern Criminal Jury Instructions 6.02; Eighth Circuit Pattern Criminal Jury Instructions 7.01 and Ninth Circuit Model Criminal Jury Instructions 5.4. The basic rationale for eliminating the specific intent instruction is a recognition that it is confusing for a jury to hear the terms "specific intent" and "general intent" and that it is sufficient to instruct the jury on the required elements, including the required mental state, without using the term "specific intent." *Id.*

This Honorable Court has already recognized that the terms "specific intent" and "general intent" can be confusing. See *Nowack, supra,* 406 n 4; *Langworthy,* supra, 639-641. Despite the confusion which exists, this Honorable Court has specifically declined to abandon the specific intent/general intent distinction because it is "deeply rooted" in Michigan's criminal jurisprudence. *Nowack, supra,* 406 n 4. Nevertheless, the People submit that while such a distinction may exist for purposes of judicial analysis of which mental states are required by a particular penal statute, the necessity of instructing the jury that any crime requires "specific intent" is unnecessary because it simply repeats an element upon which the jury has already been instructed. The People note that the commentary to CJI2d 3.9 recognizes that it is to be given immediately following an instruction on the elements of an offense and before any defenses are read. Moreover, the use notes to each substantive offense which requires or appears to require

specific intent refer back to CJI2d 3.9 and state that it should be given if intent is disputed or if the jury expresses confusion regarding the intent required to convict. See CJI2d 9.1-9.2, 10.1, 10.6, 11.17, 11.23-11.25, 11.34-11.36, 12.2-12.3, 13.15, 16.1, 16.11, 17.1-17.3, 17.5-17.7, 17.9, 17.30, 17.32, 18.1-18.4, 18.5-18.7, 19.3-19.6, 20.17-20.18, 21.1-21.2, 23.1, 23.3-23.8, 23.10-23.11, 23.13-23.15, 24.1, 24.6, 24.8, 25.1-25.2e, 25.3, 25.5, 27.1, 27.5, 28.1-28.2, 29.7-29.9, 30.6-30.8, 30.10-30.13, 31.3-31.6 and 34.1-34.2. Given that the required intent is stated in each of the separate sections when the elements which must be proven are read, repeating the required intent is simply unnecessary and may be confusing to the jury when it is given in terms of "specific intent". As such, the People submit that CJI2d 3.9(1) and (2) are unnecessarily repetitive, possibly confusing, and should not be given.

On the other hand, this Honorable Court has agreed that "[i]ntent is a secret of the defendant's mind which he can disclose by his declarations or by his actions and his actions sometimes speak louder than words." *Allstate Ins v Freeman,* 432 Mich 656, 679; 443 NW2d 734 (1989), quoting *People v Strong,* 143 Mich App 442, 452; 337 NW2d 335 (1985); *People v Doud,* 223 Mich 120, 123; 193 NW 884 (1923). Because of the difficulty of proving a defendant's state of mind, this Honorable Court has recognized that minimal circumstantial evidence is sufficient. *People v Vinokurow,* 322 Mich 26; 33 NW2d 647 (1948). See also *Strong, supra,* 452; *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). As stated in *People v Johnson,* 54 Mich App 303, 304; 220 NW2d 705 (1974), lv den 392 Mich 800 (1974):

> There would rarely be a conviction if a criminal's intent had to be confessed or proven directly by a witness. Intent, like any other fact, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows.

See also *People v Lawton,* 196 Mich App 341, 349; 492 NW2d 810 (1992), lv den 442 Mich 929 (1993).

Here, defendant will undoubtedly maintain that she did not know that her children would die and that she did not intend for them to die. Appendix 4a. Certainly, the People will dispute defendant's claimed state of mind with her action of placing and leaving her toddler son and infant daughter locked inside a hot parked car for three and three-quarters hours on a sweltering day. Indeed, defendant's own statement that she lied to the police so that she "wouldn't appear to be a horrible person, someone who left their children in a hot car" also indicates that she was aware of and intended her act as well as its resultant consequences. Appendices and 4a and 63a. Therefore, the People submit that if this Honorable Court concludes that child abuse in the first degree is a specific intent crime, instructing a jury consistently with CJI2d 3.9(3) is appropriate so that the jury will understand that it is not bound by defendant's words in determining her intent, but that it may also look to her actions to determine the secret of her mind. Because CJI2d 3.9(3) correctly states the law and will assist jurors in determining a defendant's intent, the People submit that it should be given in this case.

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Anica Letica, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court hold that child abuse in the first degree is a general intent crime and require the jury to be instructed consistently with the statutory language contained in MCL 750.136b(2) or grant any other relief which this Honorable Court deems appropriate.

Respectfully submitted,

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